UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MELVIN MEFFREY WADE Petitioner, vs. DANIEL VASQUEZ, Warden, San Quentin Prison, Respondent.	CASE NO. CV 89-0173-R OPINION AND ORDER

This matter was set for hearing on August 31, 1992 before the court, the Honorable Manuel L. Real, Chief District Judge Presiding: (1) Evidentiary Hearing to determine the existence of an alleged conflict of interest between the State Public Defender (SPD) and Melvin Meffrey Wade (WADE).

Having considered the record, the submissions by both parties, the testimony elicited during the hearing, and the oral arguments presented at the

hearing, the Court finds and orders as follows:

I.

INTRODUCTION

WADE, represented by the SPD, filed a writ of habeas corpus on December 11, 1989. An evidentiary hearing was ordered to be held February 27, 1990 on the issue of the adequacy of counsel representing WADE at trial. That hearing was stayed by the Ninth Circuit. The hearing was reset for May 22, 1990.

On May 21, 1990, the day before the evidentiary hearing was scheduled to proceed, one of the petitioner's counsel, Barry Helft (HELFT), moved to withdraw due to an unspecified reason creating a conflict of interest with WADE'S interests. Insisting on an in camera hearing without the presence of the attorney general, HELFT refused to provide the basis for the conflict in a closed

courtroom in the presence of respondent's counsel, the deputy attorney general. Out of abundance of caution, HELFT was permitted to withdraw as counsel. This court permitted him to remain at counsel table to assist his co-counsel, Don Ayoob (AYOOB), during the evidentiary hearing, and to testify concerning his claimed personal knowledge of matters going to the adequacy of counsel issue.

After a three day evidentiary hearing, the petition was submitted to the court. An opinion and order denying petitioner's requested relief is found at Wade v. Vasquez, 745 F.Supp. 1547, as modified, Wade v. Vasquez, 752 F.Supp. 931 (C.D.Cal. 1990).

On appeal to the Ninth Circuit, petitioner asserted that the alleged conflict existed prior to the evidentiary hearing. In response to the Ninth Circuit's remand order, this court held

the August 31, 1992 evidentiary hearing to determine whether a conflict existed between the SPD and petitioner as of May 22, 1990.

II.

FINDINGS OF FACT

At the evidentiary hearing held August 31, 1992, petitioner presented three witnesses who all told a similar tale. Respondent generally agrees with the fact presented, but disagrees with the factual and legal inferences the SPD draws form these facts.d

A. 1989 - EARLY FEBRUARY, 1990

Michael Pescetta (PESCETTA) was supervisor of death penalty litigation for the SPD during 1989 and 1990. PESCETTA hired HELFT on January 2, 1990, to assist the SPD in representing petitioner. HELFT had significant experience in death penalty and habeas corpus litigation, and PESCETTA claimed HELFT was slated to be

lead counsel in the representation of WADE. HELFT was assigned by PESCETTA to represent WADE on January 22, 1990 even though the pleadings filed in this court did not show him in any capacity nor did he appear in court on any hearing until the motion to withdraw.

Soon after he was assigned to the case, HELFT realized that WADE'S trial counsel was S. Donald Ames (AMES). AMES was HELFT'S former father-in-law, though the two did not have even an avuncular relationship during his marriage to AMES' daughter Jill or thereafter. HELFT testified that he saw AMES at most a dozen times, in passing, over a period spanning close to ten years, before and during his marriage to AMES' daughter Jill. They never spent holidays together; nor did anything together that would bespeak of any familial relationship. HELFT was married to AMES' daughter, Jill for about

6 years culminating in 1977. The couple had been divorced for twelve years at the time of HELFT'S assignment to represent WADE. Since their divorce, the contact between HELFT'S assignment to represent WADE. Since years, the contact between HELFT and his former wife, Jill, has been at best sporadic. HELFT told PESCETTA about his former marriage, and his "in-law" relations with AMES. They each claim to have researched the law of conflicts and determined in late January or early February, 1990 that no conflict existed due to this prior familial relationship.

B. EARLY FEBRUARY TO MAY 20, 1990

HELFT continued to work on the case. After reading the state transcripts in late April or early May, 1990,[3] HELFT, at a time not at all clear to the court,

---

3. The time records submitted indicate that HELFT billed over 500 hours on the WADE case in the four months ending May 21, 1990.

but during HELFT'S assignment, somehow suddenly recalled that he had learned from his former wife's aunt, that AMES had abused Jill emotionally, and maybe even physically, when she was a child; that she had been placed in a foster home; and that she had been living with the aunt, presumably to escape the abuse by her father, when he courted her. This evidence even if true, involves multiple hearsay and strains any relevancy consideration for AMES' conduct of WADE'S case some 15-20 years later.

The testimony of all three witnesses indicates that HELFT reported this information to PESCETTA as soon as he allegedly remembered it, and then proceed to determine whether such information would be admissible as evidence to confute AMES' defense to petitioner's ineffective assistance of counsel claim. (See Strickland v. Washington, 466 U.S. 668,

(1984).) HELFT and AYOOB properly determined that the evidence would be inadmissible. HELFT had no personal knowledge of any abuse, and whatever "knowledge" he had was hearsay, and probably double hearsay. The focus on admissibility indicates that both attorneys were poised to exploit the information to WADE'S advantage without concern for any later supposed conflict of interest. HELFT'S research concerning admissibility of this admittedly hearsay evidence seems to this privacy, or to any alleged divided loyalty between his former wife and his present client. If HELFT were so conflicted, it is incredible that he would spend time in research of the admissibility of the information the he now claims he could not assist in disclosing.

PESCETTA testified that he believed the admissibility question was

not the threshold issue. Rather, according to PESCETTA, the SPD'S focus at this point was on the question of whether HELFT had a conflict of interest which precluded him and the SPD from representing WADE. PESCETTA now curiously claims that because HELFT gained this information through conversations with his former wife's aunt, any investigation of such information would, a fortiori, require an investigation into HELFT'S personal life. PESCETTA'S concern of an investigation of HELFT'S personal life is incredible. PESCETTA'S belief that no one under the direction of the SPD would be able to conduct such an investigation of one of, in PESCETTA'S words, "their own," and that therefore the entire agency was conflicted is totally unsupported in law or logic. If true, the investigation would only have disclosed details about AMES' background and character, and

specifically, it would have revealed private facts about his daughter Jill's childhood, if there were any private facts to reveal. There would be no cause to investigate HELFT'S married life with AMES' daughter. This Court finds it difficult to comprehend how any private information about HELFT would come to light during such an investigation. He did not know AMES well enough to have been subject of his purported abuse, and his former wife was an adult, beyond AMES' control, by the time HELFT married her. Moreover, no indication of this so-called inability to investigate "one of our own" was ever made to this Court or suggested in any way by any concern expressed during the research done by HELFT and PESCETTA. In light of this evidence recent fabrication takes on realistic possibilities.

The conflict theory was strengthened in PESCETTA'S belief the HELFT was not disclosing the entire story, and by his belief the HELFT'S judgment was impaired by the conflict. It is interesting to note, however, that PESCETTA with his professed concern for HELFT'S privacy never even bothered to ask HELFT if he could or would conduct such an investigation, or if such an investigation would make it impossible for him to represent WADE. PESCETTA has given no reasonable explanation as to how he came to these beliefs.

Despite the failure to determine the answers to these simple and obvious questions, PESCETTA called a "conflict meeting" with select employees of the SPD and Michael Millman (MILLMAN) of the California Appellate Project (CAP). MILLMAN was invited to give his opinion as to whether a conflict between HELFT and

WADE precluded the SPD'S further representation of WADE.

It is at this point that the tale takes on absurd dimensions and makes a mockery of the importance of the writ of habeas corpus and the law of conflicts of interest between attorney and client. MILLMAN, like PESCETTA, never once asked HELFT about his ability to investigate AMES' background and character, or whether, if HELFT could not so investigate, he could abide such and investigation conducted by another designee either within or outside of SPD. Rather, MILLMAN testified on cross-examination that he "perceived" that HELFT was a burden with a conflict of interest. He described it in these words:

A. "He sat on the side. He didn't talk very much. His body language was one of discomfort and

displeasure that the [conflict discussion] was taking place.

Q. What body language did you observe since we were not at the meeting, sir?

A. Tucked, body sort of tucked inward, his head down, a disgruntled expression on his face."

MILLMAN also testified that he had probably spent no more than ten hours with HELFT at different times in his entire life. Yet, he was able to discern within HELFT a legal conflict of interest without the benefit of asking the man what he felt or believe, depending only on his ability to interpret "body language." Every litigant would wish for the ability to discern the intent and motivation of strangers, and ultimately make factual and legal conclusions after a cursory summation of body language, exhibited

during a legal meeting. This is blatantly absurd.

The conclusion drawn at the end of the conflict meeting was that HELFT had a conflict of interest and could not proceed with the case. The conflict went so deep, PESCETTA believed, that the entire office of the SPD also had to withdraw, leaving WADE without counsel on the eve of his federal habeas corpus evidentiary hearing. It should be noted that HELFT left the meeting before it was over. This Court wonders if he left in disgust at the patently transparent tactic his superiors were thrusting upon him, possibly endangering his professional reputation.

What is clear is that the claim of conflict of interest was no more that a tactic to delay the evidentiary hearing. PESCETTA and MILLMAN were apparently in some dream world of creating a conflict

out of he evanescence of divining body language and unasked questions.

C. MAY 21, 1990

Acting pursuant to the "conflict" determination, the day before the evidentiary hearing was scheduled proceed, HELFT filed and argued a withdrawal motion. This was the first submission to include HELFT in the counsel caption of any pleading or paper during the period of the pending petition. AYOOB signed and argued every pleading, motion, or paper submitted in this matter. Included in the "conflict" motion was the declaration of PESCETTA in which he averred to this Court that HELFT was the only attorney qualified to represent WADE in the evidentiary hearing.[4] It was clear

---

4. His testimony on August 31, 1992 calls into question the truthfulness of the declaration. On August 31, he stated that 60 of 65 attorneys employed by the State Public Defender had capital experience, and a couple had non-capital federal habeas

to this Court during the prosecution of the petition and hearing that AYOOB exhibited the ability to handle the entire matter by himself.

HELFT refused to explain the factual basis for the motion to withdraw in open court. His explanation now is that he was afraid "that if he had done it in open court in the presence of the attorney general, that the information that I gave would be immediately relayed to AMES. I believed based upon my observations of him, brief though they were, and basically based upon what my ex-wife had told me, that if he was aware of

---

experience. Certainly the State Public Defender's office has more than one attorney experienced enough in trial practice to conduct an evidentiary hearing in federal court. To suggest otherwise is to ignore the reality that Public Defenders are criminal trial lawyers. Moreover AYOOB'S representation of WADE to and through the evidentiary hearing showed his competency to handle the issues presented.

what my disclosures were that he would take it out on WADE." The extra sensory perception of the players in this "conflict" motion totally escapes this Court. This is as ridiculous a scenario as has ever been presented to this Court. HELFT created this "risk in his own mind. He "perceived" it much the way MILLMAN "perceived" the conflict of in HELFT. This court does not credit Mr. HELFT'S testimony that he believed AMES would "take it out" on WADE . AMES was hardy in any position to do such an incredible thing. HELFT and Jill, and not WADE, are the parties disclosing the embarrassing allegations claimed by HELFT. WADE and his relationship to his lawyers has nothing to do with this aspect of his habeas corpus petition. The trial of WADE was long over and AMES' conduct was to be measured objectively and largely by the record. As a lawyer, AMES has to know

that he could not perjure himself to "take it out on WADE." To this Court's knowledge, there has been no suggestions that AMES has ever threatened any of the witnesses or WADE. The SPD should spend more time asking obvious questions, and less time "perceiving" unsupported conclusions.

Moreover, there is no basis in fact for such a "fear." WADE is on death row. AMES no longer represents WADE. AMES did not exactly have easy access to WADE or WADE'S witnesses. The Attorney General had no knowledge of what WADE could or would offer in support of WADE`S ineffective assistance of counsel claim. WADE is probably in the safest environment possible with respect to any dangers or threats form the outside world. Did HELFT believe that AMES would somehow make an attack on WADE in prison? The absurdity of the question indicates the

absurdity of HELFT'S Claim. This Court would have found a somewhat more plausible excuse if HELFT had feared for his ex-wife's life, in that AMES could find her and harm her; and in that it was she, who could, if admissible, testify on the childhood abuse. Even still, this certainly would not be sufficient to rise to the level of any legal or logical conflict of interest between WADE and the SPD. If anything, it had to be a convergence of interest - all parties concerned would want the true AMES exposed for the world to see, before he could wreak any more claimed harm.

At the motion to withdraw, the SPD could cite no rule of professional conduct violated by this situation. The SPD has yet to cite any authority to advance its unique theory of the law of conflict of interest between attorney and

client. HELFT owed no duty of loyalty to AMES or to Jill.

Out of an abundance of caution, this Court granted HELFT'S motion to withdraw direct participation in the hearing but denied it as to the SPD. HELFT was permitted to remain at counsel table to assist AYOOB, who had been preparing the case from its outset. The Court included the option that HELFT could testify as a witness if the information he had was either relevant or otherwise admissible. AYOOB'S advocacy was zealous and competent. HELFT assisted throughout the hearing from counsel table. The hearing lasted three days. WADE'S case was not harmed in any way by AYOOB'S performance at the evidentiary hearing.

III.

CONCLUSION

Given the absence of any duty of loyalty owed by HELFT to either AMES, his

former father-in-law, or to Jill, his former wife, there can be no basis for finding a conflict of interest in HELFT'S or the SPD'S representation of WADE. Even if this Court could find a conflict, which it cannot, in HELFT'S hearsay knowledge, this Court cannot find that the SPD had such a conflict.

This court would be the first to step up to vote against the death penalty. To put personal philosophy ahead of judicial duty is not the function of a judge sworn to uphold the law and do justice. To act as an advocate by subverting the function of the writ of habeas corpus I cannot and will not do. I heard the admissible evidence at the hearing on May 22, 23 and 24, 1990 and made my ruling on the petition. It is that judgment that should be the focus of the appeal in the case. I stated in my opinion, Wade v. Vasquez, 752 F.Supp 931

(C.D. Cal. 1990) that I believed that the conflict issue was bogus and interposed only for the purpose of delay. This hearing has not changed what was obvious then.

The motion was denied then and upon reconsideration ordered by the Court of Appeals in denied again.

DATED: December 9, 1992.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

Filed - December 9, 1992